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**TO: Chairman John Parete**  
**DATE: October 8, 2015**  
**RE: Free Service at County Owned Electric Vehicle Charging Stations**

**OPINION 2015-001**

**Free Service at County Owned Electric Vehicle Charging Stations**

This opinion represents the views of the Office of the Ulster County Comptroller at the time they were rendered, based upon facts and records as presented to this office by the persons or departments making the inquiry or contacted in order to render this opinion. This opinion may no longer represent those views if, among other things, facts provided are determined to be inaccurate, or there have been subsequent court cases or statutory amendments that bear on the issues discussed in this opinion.

**ISSUE PRESENTED**

You asked whether free service to both residents and non-residents at electric vehicle charging stations that are located on properties owned by Ulster County ("County") would violate the Gift and Loan Clause of the New York State Constitution. For the reasons set forth below, it is the opinion of the Ulster County Comptroller's Office that the program in its current form is unconstitutional and corrective action should be taken.

**INTRODUCTION**

In 2015, the Ulster County Executive installed nine electric car charging stations on county-owned properties and facilities; this service has been provided free of charge to both resident and non-resident members of the public with the stated intentions of growing regional tourism and promoting cleaner energy sources.<sup>1</sup> On September 15, 2015, the Ulster County Legislature

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<sup>1</sup> See *gen* "Ulster County has installed 9 electric car-charging stations, and they can be used for free." Available at <http://www.dailyfreeman.com/general-news/20150809/ulster-county-has-installed-9-electric-car-charging-stations-and-they-can-be-used-for-free>

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passed a resolution in regulation of this program<sup>2</sup>; however, there is no firm directive as to the issue of compensation for rendered services.<sup>3</sup> The following opinion memorializes our concerns with the current policy of universally free usage of these stations and provides recommendations to make the service more equitable for the County's residents and finances.

### **STATEMENT OF ISSUES**

The issues may be summarized as follows: (i) whether free service at these stations is being given in violation of the Gift and Loan Clause of the New York State Constitution,<sup>4</sup> (ii) whether this service has received similar scrutiny throughout the state, and (iii) whether measures should be adopted going forward to guard against potential liability or revenue losses for the County.

### **AS TO THE CONSTITUTIONALITY OF FREE CHARGING SERVICES**

The unofficial policy of the County since the stations were installed has been universal, unlimited service for no cost to non-commercial electric vehicles.<sup>5</sup> There is no disputing this program is a positive step by the County to reduce reliance on fossil fuels and promote "greener" energy alternatives. In fact, we support the County Executive's arching and commendable effort to reduce our carbon footprint. However, it is the manner in which this service is offered for no compensation from the vehicle's operator that raises a constitutional issue, namely being, whether the free usage of charging stations is a prohibited gift of County resources to both residents and non-residents.

Review of relevant cases in the state courts and commentary by the Office of the State Comptroller ("OSC") indicates the possibility of a constitutional claim based on the impermissibility of the program in its current form. OSC opinions have routinely called into question and strongly advised against the gifting of public utilities or resources to private interests.<sup>6</sup> Additionally, case law shows this issue rests on a determination of whether the primary beneficiary of a governmental expenditure or allocation of a resource is the public (i.e. an official action being necessary for the common good and general welfare of the people of the municipality, sanctioned by its citizens and public in nature).<sup>7</sup>

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<sup>2</sup> The measure passed 21-1 with Legislator Manna Jo Greene being the sole vote in the negative.

<sup>3</sup> See Ulster County Legislature's Resolution No. 332. Available at <http://ulstercountyny.gov/sites/default/files/332-15.pdf> (stating that "the decision to offer the electric free of charge to all non-commercial vehicles is still being vetted[.]")

<sup>4</sup> See *gen* NYS Const. Art. 8, Sec. 1: "No county [. . .] shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking[.]"

<sup>5</sup> No Executive Order or Resolution by the Ulster County Legislature could be found for guidance on terms and conditions of the program while an official policy was being determined.

<sup>6</sup> See *gen* Op. State Compt. 79-755 ("a city may not provide water at a free or reduced rate to a private hospital or private adult nursing home"); 15 Op. State Compt. 313, 1959 (1<sup>st</sup> Case) ("it is unconstitutional for a village to enter into an agreement to provide free water to a private individual from a village-owned well"); 16 Op. State Compt. 20, 1960 ("a village may not operate a chlorinator for sewage purposes, for the sole benefit of three property owners"); 18 Op. State Compt. 222, 1962 ("a city may not purchase and install water pumps in individual homes for the purpose of increasing water pressure therein at no cost or at a nominal cost to the owners"); and Op. State Compt. 67-673 ("the board of education of a central school district may not give to private citizens, or sell for less than its reasonable value, property belonging to the school district")

<sup>7</sup> See *gen* Landmark West! v. City of New York, 2005, 9 Misc. 3d 563, 802 N.Y.S.2d 340 (stating that "in general, Gift and Loan Clause of New York Constitution prohibits a municipality from expending money for the benefit of a

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It is true that incidental benefits to private interests or individuals do not otherwise invalidate municipal expenditures that have a strong public purpose in mind.<sup>8</sup> However, when private interests outweigh the full benefit for which the public offering was intended then an action or project will likely be invalidated.<sup>9</sup> In this situation, despite stated public purposes of promoting the County through increased tourism opportunities and adding to our “green” infrastructure, there is no defensible position as to why the service must be given out for free to an infinitesimal subset of the community. The “benefit” in question and in its present form is acutely targeted to a staggering minority regardless of intentions to help everyone. The same boon to tourism and our environment could be accomplished while asking for a modest fee, as is the practice of the ample majority of the state and is discussed greater at length in the section below. Free service is not a deal breaker, as goes the age old adage, “if you build it, they will come”; we can ably reduce our carbon footprint and appeal ourselves to eco-friendly travelers while still charging a miniscule fee for the electricity provided.

At this point in time, the public interest is not best served by free usage of these stations because the amount of individuals who own traditional, gas-powered vehicles far exceeds the number of owners of those powered by electricity. As of 2015, only 44 electric vehicles have been identified as being based within the County – accounting for not even 1 percent of statewide ownership of these types of automobiles.<sup>10</sup> For the County to subsidize the travel expenditures of a fraction of the local population, is unjustified and contrary to the interests of the vast majority of local residents and non-residents alike. Besides the admirable and environmentally friendly goal (i.e. not a distinct, legislative mandate) of fostering economic development and increasing access to non-petroleum resources, the reality is that the overwhelming prevalence of persons in and around Ulster County will not avail themselves of this service. Moreover, it should be mentioned that this free-use policy was instilled before any local law was ever passed defining the intentions of the program. Until such time that gas-powered vehicles lose their status as the predominant means of mass transportation, it cannot be said that free “fuel” for electric vehicle operators serves a legitimate governmental purpose or otherwise benefits the public as a whole rather than a relative handful of private individuals.

### **AS TO OTHER ELECTRIC CAR CHARGING POLICIES WITHIN THE STATE OF NEW YORK**

Most public charging stations introduced under Governor Cuomo’s Charge NY initiative utilize private operators to maintain their systems that are located on municipal lands and thereby require users to pay a nominal fee. Some locations, such as the City of Rochester, have introduced free charging stations for a temporary trial period of one year; however, the

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private individual or concern unless the expenditure is in furtherance of a public purpose and the municipality is contractually or statutorily required to do so”); and *Belt Line Ry. Corp. v. City of New York*, 118 Misc. 665, 670, 195 N.Y.S. 203, 206-07 (Sup. Ct. 1922) (determining that “a new [privately owned bus line that is operated by the city] gives no transfers, and the mere fact that it may be convenient for a small part of the community is no justification for its unlawful existence”)

<sup>8</sup> See *New York Tel. Co. v. Secord Bros., Inc.*, 1970, 62 Misc.2d 866, 309 N.Y.S.2d 814

<sup>9</sup> See *gen Murphy v. Erie County*, 1971, 28 N.Y.2d 80, 320 N.Y.S.2d 29, 268 N.E.2d 771 (distinguishing case at hand from others “where the benefit of the challenged expenditure accrued only to a private party”)

<sup>10</sup> See “Number of Electric Vehicles in New York.” Available at <http://lohud.nydatabases.com/database/number-electric-vehicles-new-york>

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expectation is that users will ultimately have to pay for these services.<sup>11</sup> Other examples of municipally or publicly owned charging stations and their associated user fees are as follows:

- In 2014, the City of White Plains installed ten charging stations in public parking garages under the Charge NY initiative, and “the customer pays \$1.50/hour, which covers both parking and electricity, through the normal payment process at the garage pay stations”<sup>12</sup>;
- In 2015, the New Castle Town Board decided that users should pay a fee for service and set rates of “\$2.58 an hour, or a maximum of \$10 for 12 hours, to plug in to one of three electric car charging stations at the Chappaqua train station”<sup>13</sup>;
- In 2014, as part of the Charge NY initiative, Albany International Airport installed six electric vehicle charging stations, where “drivers will be able to charge their cars without cost for a two-year trial period [assumedly during which data on frequency of use, length of charges, and amount of energy dispensed will be analyzed in order to more accurately tailor associated rates for service], after which there will be a nominal fee”<sup>14</sup>;
- As part of its plan to “revitalize its downtown area [. . .] and attract more visitors [,]” the Village of Haverstraw currently charges \$2.50 per hour for users to park and charge their vehicles, despite comments to revisit pricing policies after more adequately determining the stations’ usage<sup>15</sup>; and
- “Since [2014], drivers also have been able to plug in for a small fee [of about \$2.50] at Metro-North Railroad Stations in Tarrytown and Chappaqua.”<sup>16</sup>

One exception is in the Town of Huntington, which has made five charging stations available for free at their Long Island Railroad station. This case is somewhat different as the charging stations utilize power generated from solar panels installed on the roof of the parking garage in which the charging stations are located. These solar panels were purchased with federal stimulus monies distributed by the New York State Energy Research and Development Authority (NYSERDA) and a town contribution of 25 percent of the cost, but the day-to-day cost of facilitating energy is essentially free due to the solar generated power.

However, two communities across the state have expressly concurred with our opinion that free access to these stations is likely in violation of the New York State Constitution. A conversation with their city attorney and reports from local and national media outlets detailed how Watertown, NY ultimately chose not to pursue municipally owned electric car charging stations,

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<sup>11</sup> See “EV Charging.” Available at <http://www.cityofrochester.gov/evcharging/>

<sup>12</sup> See “City of White Plains Rolls Out 10 Additional Electric Vehicle Charging Stations In Partnership With NYPA and NYSERDA.” Available at <http://www.cityofwhiteplains.com/DocumentCenter/View/985>

<sup>13</sup> See “New Castle Board Oks Hourly Rates for Car Charging Stations.” Available at <http://www.theexaminernews.com/new-castle-board-oks-hourly-rates-for-car-charging-stations/>

<sup>14</sup> See “Six New Electric Vehicle Charging Stations Installed at Albany Airport.” Available at <http://www.nyserdera.ny.gov/About/Newsroom/2014-Announcements/2014-06-11-Six-New-Electric-Vehicle-Charging-Stations-Installed-at-Albany-Airport>

<sup>15</sup> See “Charging Station at the Village of Haverstraw.” Available at <http://www.nyserdera.ny.gov/Cleantech-and-Innovation/Electric-Vehicles/Case-Studies/Public-Access-Locations>

<sup>16</sup> See “Car charging stations on Thruway delayed, other options available.” Available at <http://www.poughkeepsiejournal.com/story/news/local/2015/09/28/car-charging-stations-thruway-delayed-options-available/73000850/>

as to avoid any potential conflict with the state constitution.<sup>17</sup> Further, discussions with the Comptroller of Ogdensburg, New York and a review of regional newspapers revealed that the OSC advised the city that providing these services for free would be impermissible for the same reason; despite their goals of economic development and an opportunity to increase tourism from Canada, plans for municipal ownership were quickly dropped but endorsed by the Greater Ogdensburg Chamber of Commerce.<sup>18</sup>

### **AS TO FUTURE PROTOCOL**

Recognizing the County may be acting in violation of the New York Constitution, or at the very least is missing out on revenue that could potentially self-finance the program or lead to a “green” source of earnings, we are concerned by the free and relatively unconstrained nature of this public offering. In the instant situation, the immediate harm is small given the estimation that services will only cost the County approximately \$500, according to comments made in the press,<sup>19</sup> albeit assumingly without any significant traffic and usage studies having been performed. However, the County would be exposed to significant liability should an aggrieved taxpayer bring a lawsuit against it pursuant to Section 51 of the General Municipal Law by challenging this action as a waste of public resources.

It is worth sharing suggested practices that have been promoted by NYSERDA through the Charge NY initiative:

“Station owners can charge for use per hour, per session, or per unit of electricity. If you charge per hour, there is a set cost for any vehicle whether it is charging or not, and different vehicles receive electricity at different rates, so the cost of energy may vary widely by charging session.

Charging per session is usually more appropriate for workplace charging or charging stations that have very short, regular sessions. Charging by unit of energy (usually kilowatt-hour [kWh]) accurately accounts for the true cost of electricity for the charging station owner, but does not give an incentive for a car that is fully charged to leave the space. Some site owners have tried combinations of these approaches, such as charging a flat rate for the first two hours, then an increasing rate for longer sessions.”<sup>20</sup>

Accordingly, we respectfully recommend the County to immediately adopt an electric car charging policy that allows it to recoup a reasonable fee-for-services that are rendered to operators of electric vehicles based on kilowatt and/or time of usage. This suggestion would protect the County against an attack upon the constitutional validity of the program while providing a revenue stream to help fund this very laudable effort to promote renewable and

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<sup>17</sup> See *gen* “NY deems free electric car charging unconstitutional on public property.” Available at [http://www.foxnews.com/leisure/2013/05/01/ny-deems-free-electric-car-charging-unconstitutional-on-public-property/?cmpid=cmt\\_plus\\_fn](http://www.foxnews.com/leisure/2013/05/01/ny-deems-free-electric-car-charging-unconstitutional-on-public-property/?cmpid=cmt_plus_fn)

<sup>18</sup> See “Ogdensburg Chamber endorses electric car charging stations idea for city.” Available at <http://www.watertowndailytimes.com/article/20130426/NEWS05/704269871>

<sup>19</sup> See “Ulster County has installed 9 electric car charging stations.”

<sup>20</sup> See “Information for Charging Station Hosts.” Available at <http://www.nyserda.ny.gov/Cleantech-and-Innovation/Electric-Vehicles/Info/Charging-Station-Hosts>

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cleaner sources of energy. A small fee would hardly impact consumers<sup>21</sup> but could allow for the program to pay for itself or generate additional income in a best case scenario.

Recognizing potential limitations in personnel and resources as far as the actual collection of such a fee, perhaps monthly, weekly, or usage-based plans or permits could be made available at a fair price in order to incentivize the public. Otherwise, maybe a more novel approach could be taken by soliciting sponsorship of these stations by car manufacturers or dealerships that choose to promote green energy alternatives; in this model, private motorists could potentially avail themselves of free services while private businesses foot the electricity bill.

## **CONCLUSION**

It is our arching goal not to put the County in harm's way – either through litigation or missed revenue. Let us once more be clear, the Ulster County Comptroller offers its utmost support for endeavors that further economic development, regional tourism, green energy, and a reduction of our carbon footprint. However, it is the free nature of the electric car charging program that is likely in violation of the New York State Constitution's Gift and Loan provision, as the same "end" could be accomplished through a different "means." For those reasons, we strongly suggest that the County immediately develop and implement a reasonable fee-for-service policy.

Elliott Auerbach, Comptroller

October 8, 2015

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<sup>21</sup> See gen "Burbank installs 8 curbside electric vehicle charging stations." Available at <http://www.latimes.com/local/california/la-me-electric-car-stations-20150907-story.html> (discussing a similar municipal project funded largely through grants where "charging at the stations will cost users about 17 cents a kilowatt-hour during off-peak hours or 30 cents a kilowatt-hour during the peak hours of 4 to 7 p.m. on weekdays in the summer")